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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

*J. Cohen
Proc I*

FILE: B-187270

DATE: December 17, 1976

MATTER OF: Concept Merchandising, Inc., et al.

DIGEST:

IFB to provide carpeting required submission of color list with bid to determine compliance with IFB as to number of colors required. Since bidder is obligated by signing bid to furnish minimum number of colors required, requirement may be considered one concerning responsibility, and color list may be submitted after bid opening.

Invitation for bids (IFB) No. FEHP-C-25251-A-7-12-76 was issued on June 9, 1976, by the Federal Supply Service, General Services Administration (GSA), to provide a number of types of special purpose carpet by means of a requirements contract. Clause 27b of the IFB required each bidder to furnish, prior to bid opening, lists of colors for the items covered by its bid. Specifically, the clause provided in pertinent part:

"LIST OF COLORS OFFERED

"Offerors are required to attach to their offer a list of all colors being offered for each item, showing manufacturer's name, and color name, and color number. * * * The list of colors shall be used to determine compliance with the solicitation as to the number of color[s] required. Failure to submit a list with at least the minimum number of colors required, prior to bid opening, will necessitate rejection of the bid."

In addition, bidders were advised in clause FE-27:

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"(e) Required Colors: A list of the required minimum number of patterns or multi-colors and plain colors is listed elsewhere in this solicitation. These minimums must be continuously available throughout the contract period. * * * Failure to offer the required number of colors will necessitate rejection of the offer."

Nineteen bids were received. Color lists were not submitted by four of the bidders: Commercial Carpet Corporation, Wellco Carpet Corporation, Concert Merchandising, Inc., and Seamloc-Lona-Loom Carpet Company. Their bids were rejected as nonresponsive by the contracting officer. The four firms then protested the contracting officer's determination to our Office.

The protesters cite clauses 276 and FE-27, the bases for the rejection of their bids, as providing that the reason for requiring color lists was to determine whether bidders would furnish the number of colors required by the IFB for the items for which bids were submitted. However, the protesters state, notwithstanding a bidder's failure to provide a color list with its bid, the bidder would be obligated simply by signing its bid to furnish the minimum number of colors required. They contend that the omission would not, therefore, affect an otherwise successful bidder's obligation to furnish the item in the proper number of colors, but would go only to the bidder's ability to supply the requisite number, a matter of responsibility, not responsiveness, which can be met after bids are opened.

In contrast, other firms that submitted bids and color lists in response to the IFB state that both the requirement to submit the lists with the bids, and the penalty for failure to do so, were clearly stated in the IFB, and that the protesters' bids were, therefore, properly rejected as nonresponsive.

In its report concerning the protest, GSA states that for approximately 12 annual periods it has utilized substantially the same type of solicitation for the procurement of special purpose carpeting. Submission of the color lists required by those solicitations was permitted after bids were opened, and the lists were used in determining a bidder's responsibility and for administrative purposes, not in evaluating the bidder's

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responsiveness. Accordingly, in response to this protest, GSA proposes to follow a similar procedure and to consider the color lists required by the present IFB only in connection with the responsibility of the low responsive bidders, in which case the lists may be submitted at any time prior to award, as suggested by the protesters.

While statements in solicitations warning bidders that failure to comply with a particular requirement will result in rejection of the bid as nonresponsive often establish the materiality of the requirement, it is not necessarily material solely because it is accompanied by that warning. Bartley, Inc., 53 Comp. Gen. 451 (1974), 74-1 CPD 1. When "[i]t is clear that the clause is merely for informational purposes and does not purport to bind the bidder to any course of action or other obligation upon acceptance of the bid," the clause goes to the matter of bidder responsibility rather than responsiveness and the information required by the clause can be furnished after bid opening. Allis-Chalmers Corporation, 53 Comp. Gen. 487, 489 (1974), 74-1 CPD 19; Royal Industries, B-185571, March 1, 1976, 76-1 CPD 139. See also 53 Comp. Gen. 431 (1973); O. C. Holmes Corporation, 55 Comp. Gen. 262 (1975), 75-2 CPD 174.

We agree that the listing of colors in this case involves only the ability of the bidder to supply the number of colors it is obligated to have available under the contract. Thus, we have no objection to the procedure GSA intends to follow in this case. Accordingly, the protests are sustained.

In addition, GSA requests our advice concerning the submission of color lists in future similar solicitations. GSA states that prior to the issuance of the next solicitation, it will determine whether to continue the requirement for color lists as a matter of responsibility. If it so determines, GSA will consider setting forth the requirement as a definitive objective element in the award process in accordance with our Office's guidelines concerning the inclusion of specific responsibility criteria within the terms of an IFB, and will apprise bidders of the requirement in an introductory notice to the solicitation. In general, we have no objection

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to such proposal, and agree that it should appropriately resolve for future solicitations the issues raised in connection with the present IFB.

Milton Jordan

For The Comptroller General
of the United States